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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 226

GABBS EXPLORATION COMPANY, *Petitioner*,

v.

STEWART L. UDALL, Secretary of the Interior.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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GABBS EXPLORATION COMPANY, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on February 14, 1963.

### OPINIONS BELOW

The opinion of the Deputy Solicitor of the Department of the Interior rejecting petitioner's application for a patent in respect of its Sibbald-Coral claims (JA 17-38)[1] is

[1] "JA" refers to the Joint Appendix printed for the court below, nine additional copies of which have been furnished pursuant to Rule 21(4).

reported at 67 I.D. 160. His opinion rejecting petitioner's application for a patent in respect of its Mullins claims (JA 9-17) is not reported. The District Court wrote no opinion. The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A8) is reported at 315 F. 2d 37.

## JURISDICTION

The judgment of the court below (Appendix B(1), *infra*, p. A8) was entered on February 14, 1963. A timely petition for rehearing was denied on March 26, 1963 (Appendix B(2), *infra*, p. A9). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Whether the Secretary of the Interior had administrative power to cancel a valid, perfected mining claim for alleged subsequent abandonment; or, alternatively phrased with reference to the circumstances of this case, whether a valid, perfected mining claim, which constitutes property in the fullest sense of that term, can be wiped out and destroyed simply by failure to reply to a letter written by the Secretary of the Interior.

## STATUTES INVOLVED

The statutes involved are set out in Appendix C, *infra*, pp. A9-A12.

## STATEMENT

Inasmuch as only a single one of the issues passed on by the court below is now pressed, the facts giving rise to the present controversy, which are not in dispute, may be stated as follows:

Petitioner Gabbs Exploration Company, an existing Nevada corporation (JA 47) with its principal place of business in Utah, hereinafter "Gabbs," brought this action against Stewart L. Udall, Secretary of the Interior, herein-

after "the Secretary," to review, by an action for a declaratory judgment and for relief in the nature of mandamus, decisions of his predecessor in respect of two groups of unpatented oil shale placer claims, the first known as the Mullins claims, the second as the Sibbald-Coral claims. Each group was made the subject of a separate cause of action.

### A. The Mullins Claims.

In 1918, Gabbs' predecessors in title located eight oil shale placer claims in Rio Blanco County, Colorado, known as Mullins Nos. 9 through 12, inclusive, and as Mullins Nos. 25 through 28, inclusive (Cmplt. ¶5, JA 2-3; Ans. ¶IV, JA 40). These will be referred to hereafter as the Mullins claims.

In March 1929, the then Secretary of the Interior, through his subordinates, caused a contest to be instituted against the record owners of the Mullins claims, in which it was alleged, insofar as here material,

> "2. That there has not been expended upon each and every one of the claims labor and improvements of a reasonable value of $100 for the assessment years ending July 1, 1921, to July 1, 1928, inclusive, and the claims have been abandoned." (Cmplt. ¶6, JA 3; Ans. ¶IV, JA 40.)

In April 1929, the record owners of the Mullins claims were served copies of the contest notice. About a month later the Register of the Denver Land Office advised the Commissioner of the General Land Office that the contestees had failed to file an answer within the time allowed by the regulations of the Department of the Interior governing contests, and accordingly recommended cancellation of the claims. Thereafter, on June 5, 1929, the Commissioner of the General Land Office, with the approval of the then Secretary of the Interior, declared the Mullins oil shale locations null and void, and directed the Register

to notify the contestees accordingly. (Cmplt. ¶7, JA 3; Ans. ¶IV, JA 40.)

The foregoing contest has never been entered on the tract books in the Denver, Colorado, Land Office relating to the lands on which the Mullins claims were located (Stip. ¶2, JA 56), although it was contemporaneously entered on the appropriate tract books in the General Land Office in Washington (Stip. ¶1, JA 56).

Subsequent to the date of the foregoing contest, this Court held that a charge of failure to perform assessment work would not serve as a basis for declaring unpatented mining claims null and void. *Wilbur* v. *Krushnic*, 280 U.S. 306 (January 6, 1930); *Ickes* v. *Development Corp.*, 295 U.S. 639 (June 3, 1935).

Following numerous mesne conveyances, duly set forth in the record, Gabbs on April 14, 1956, by quitclaim deed purchased the Mullins claims (Cmplt. ¶10, JA 4; Ans. ¶VI, JA 40-41; Stewart affi. ¶¶ 6, 7, JA 45-46).

Thereafter, in October 1956 and May 1957, Gabbs applied for patents on all of the Mullins claims, submitting in connection therewith all of the supporting documents and proofs required by 30 U.S.C. §29 and by 43 CFR, Part 185 (Cmplt. ¶11, JA 4; Ans. ¶VII, JA 41; Stewart affi. ¶8, JA 46).

In August 1958, however, the Manager of the Colorado Land Office rejected Gabbs' applications for patents on the ground that the Mullins claims had theretofore been declared null and void. On appeal, this decision was affirmed by the Director of the Bureau of Land Management in June 1959. On further appeal, the Director's decision was affirmed by the Deputy Solicitor as the duly authorized delegate of the then Secretary of the Interior on May 24, 1960, and a petition for reconsideration was denied on July 11, 1960. (Cmplt. ¶12, JA 4-5; Ans. ¶VIII, JA 41.) The decisions at the Secretarial level are duly

set forth in the record; they extend over more than 8 pages of the joint appendix (JA 9-17).

Some of the lands on which the Mullins claims were located were thereafter patented to third parties with a reservation of minerals in the United States, and oil and gas leases have since been executed covering some of the lands on which the Mullins claims were located (JA 12-13).

It is common ground between the parties that Gabbs had exhausted all of its administrative remedies within the Department of the Interior in respect of the Mullins claims prior to seeking relief in the courts (Cmplt. ¶14, JA 5; Ans. ¶X, JA 41).

### B. The Sibbald-Coral Claims.

In 1917 and 1918, Gabbs' predecessor in title located 18 oil shale placer claims in Garfield County, Colorado, known as Sibbald Nos. 1 through 12, inclusive, and Coral Nos. 3 through 8, inclusive (Cmplt. ¶15, JA 5; Ans. ¶XI, JA 41). These will be referred to hereafter as the Sibbald-Coral claims.

In December 1929, the then Secretary of the Interior, through his subordinates, caused a contest to be instituted against the record owner of the Sibbald-Coral claims, in which it was alleged:

> "1. That there has been no assessment work performed upon any of the above described placer mining claims for the assessment years ending July 1, 1921, up to and including July 1, 1929.
>
> "2. That each and every one of said claims has been abandoned." (Cmplt. ¶16; JA 5; Ans. ¶XI, JA 41.)

In January 1930, the record owner of the Sibbald-Coral claims was served a copy of the contest notice. In April 1930 the Register of the Denver Land Office advised the Commissioner of the General Land Office that the contestee had failed to file an answer within the time allowed by the

regulations of the Department of the Interior governing contests, and accordingly recommended cancellation of the claims. Thereafter, on May 19, 1930, the Commissioner of the General Land Office, with the approval of the then Secretary of the Interior, declared the Sibbald-Coral oil shale locations null and void, and directed the Register to notify the contestee accordingly (Cmplt. ¶17, JA 6; Ans. ¶XI, JA 41).

The foregoing contest was contemporaneously entered on the appropriate tract books in the General Land Office at Washington, D. C. (Stip. ¶3, JA 56), but it was not so entered in the tract books of the Land Office at Denver, Colorado (Stip. ¶4, JA 57). There is evidence in the record showing that the Sibbald-Coral contest was not entered in the Denver Land Office tract books until February 13, 1961, three weeks after the present action was brought (Evans Affi. ¶¶3-4, 6-7, JA 48-50; Exhs. to Evans Affi., JA 51-53).

Meanwhile, as has been noted (*supra*, p. 4), this Court held that charge of failure to perform assessment work would not serve as a basis for declaring unpatented mining claims null and void.

Thereafter, on March 21, 1956, Gabbs by quitclaim deed purchased the Sibbald-Coral mining claims (Cmplt. ¶19, JA 6; Ans. ¶XIII, JA 41-42).

Subsequently, in August 1956, Gabbs applied for patents on all of the Sibbald-Coral claims, submitting in connection therewith all of the supporting documents and proofs required by 30 U.S.C. §29 and by 43 CFR, Part 185 (Cmplt. ¶20, JA 6-7; Ans. ¶XIV, JA 42). These claims were inspected and approved for further processing, and publication pursuant to the application was duly made and completed (Stewart affi. ¶ 4 and Ex. B thereto, JA 45, 47). Final proof on the claims was submitted in August 1957, purchase money in the sum of $7,200 was paid, and a

receipt issued to Gabbs therefor (Stewart affi. ¶ 5 and Ex. C thereto, JA 45, 47).

In February 1958, however, the Manager of the Colorado Land Office rejected Gabbs' applications for patents on the ground that the Sibbald-Coral claims had theretofore been declared null and void. On appeal, this decision was affirmed by the Director of the Bureau of Land Management in April 1959. On further appeal, the Director's decision was affirmed by the Deputy Solicitor as the duly authorized delegate of the then Secretary of the Interior on April 25, 1960, and a petition for reconsideration was denied on June 10, 1960. (Cmplt. ¶21, JA 7; Ans. ¶XV, JA 42.) The decisions at the Secretarial level are duly set forth in the record; they extend over nearly 22 pages of the joint appendix (JA 17-38) and are reported at 67 I. D. 160.

Oil and gas leases have since been executed covering the lands on which the Sibbald-Coral claims were located (JA 33, 43). Part of those lands were later conveyed to one Burton McKee (JA 33-34, 43). The parties are now agreed that this patent contained a reservation of minerals to the United States (Stip. ¶5, JA 57), although the Secretary's decision does not disclose that circumstance (JA 33-34).

With respect to the Sibbald-Coral claims also, the parties agree that Gabbs had exhausted all of its administrative remedies within the Department of the Interior before seeking judicial review (Cmplt. ¶23, JA 7; Ans. ¶XVII, JA 42).

### C. The Present Proceeding.

Gabbs brought suit against the Secretary on January 23, 1961, praying (1) for a judgment declaring that the Mullins and Sibbald-Coral contests were severally invalid; (2) for a judgment that the decisions of the Secretary's predecessor cancelling the Mullins and Sibbald-Coral

mineral claims were severally null and void; (3) for a judgment enjoining the Secretary from rejecting Gabbs' applications for patents to the Mullins and Sibbald-Coral claims on the basis of the foregoing contests and decisions; and (4) for a judgment directing the Secreary to determine Gabbs' right to the patents in question without regard to those contests and decisions (JA 1-8).

Both parties moved for summary judgment, supplementing the pleadings with affidavits and documents (JA 44-53). Those motions were heard on September 22, 1961 (JA 1). Over two months later, the District Court (Matthews, J.) announced its decision, granting the Secretary's motion and denying Gabbs', without however writing any opinion or otherwise explaining the result (JA 55).

On appeal (JA [illegible]56), the court below held, with respect to the issue now presented, that it was foreclosed by this Court's comment in *Ickes* v. *Development Corp.*, 295 U.S. 639, 645, that the Secretary had authority to cancel administratively a mining claim on the ground of abandonment (Appendix A, *infra*, at pp. A3-A5), and accordingly affirmed the judgment of dismissal (Appendix B(1), *infra*, p. A8). A timely petition for rehearing, which pointed out that the comment in question was dictum, since the pleadings in the *Development Corp.* case negatived any abandonment, and that the dictum was moreover without any support in the decisions, was denied (Appendix B(2), *infra*, p. A9).

## REASONS FOR GRANTING THE WRIT

In this case the court below in effect abdicated its judicial function, following without the slightest effort at analysis an expression in an opinion here that was clearly *obiter*, an expression that was not supported either by the authorities there cited nor by any other, an expression that was moreover clearly at variance not only with a significant executive ruling (which the court below did not

cite, much less discuss, although the ruling had been strongly pressed upon it), but which was additionally inconsistent with the course of Congressional legislation on the subject.

The question that is now presented for authoritative resolution is particularly significant at this time for two reasons.

1. The issue here tendered is clouded by the crossfire of apparent inconsistencies in two closely related cases decided during the last Term.

The tenor of *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, would lead one to believe, on the one hand, that the power of the Secretary of the Interior over unpatented mining claims is unlimited, even where that officer institutes proceedings to condemn such claims, so that in effect he becomes judge in his own cause to adjudicate the value of what he is himself taking. That decision, as we point out below, failed to consider a vital statutory qualification to the Secretary's omnicompetence, one that is vital and indeed controlling here.

But *Boesche* v. *Udall*, No. 332, last Term, decided May 27, 1963, reaffirms the traditional view that there is a decisive difference of substance between the Secretary's power to cancel mineral leases or invalid mining claims, and his power over perfected and valid mining locations, such as are involved here; the latter convey an unencumbered estate in the minerals. The result reached below in the present case is therefore, in our view, utterly inconsistent with the limitations carefully delineated in the *Boesche* opinion.

But, at the very least, the desirability of resolving the apparently conflicting expressions in *Boesche* and *Humboldt Mining*, and the public interest in such clarification for the guidance of the land department and of the lower

courts, combine to demonstrate the need for review by this Court. This is particularly so at the present time, because, by reason of the enactment of 28 U.S.C. §1391(e), which now permits the Secretary to be sued wherever the plaintiff resides or wherever the land is located, the present question can arise in many other Circuits. It is therefore no longer one necessarily restricted to litigation brought in the District of Columbia.

2. The question of the Secretary's power to cancel valid mining claims for subsequent abandonment, the only issue now tendered, is presently involved in a host of proceedings currently pending at various stages within the Interior Department's lengthy administrative processes.

*First.* The mining claims here in issue—Mullins and Sibbald-Coral—were duly located in 1917 and 1918. There has never been any question whatever concerning their validity *ab initio:* the land was subject to location, it was mineral, and there was a sufficient discovery. The contrary has never even been so much as intimated. Consequently, these were valid mining claims, and as such they were property in the fullest sense of that term. As this Court said in *Wilbur* v. *Krushnic*, 280 U.S. 306, 316, only recently quoted with approval in *Boesche* v. *Udall*, *supra* (p. 6, note 7, of slip opinion):

> "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property', subject to the lien of a judgment recovered against the owner in a state or territorial court."

We pause to answer three subsidiary questions that will undoubtedly occur at once to the reader.

1. The circumstance that mining claims now in question were for so many years never sought to be patented detracts nothing from their validity, as this Court long ago pointed out in *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U.S. 220, 224:

> "The fact that many years have elapsed since the original location of the placer claim, and that no patent has yet been issued therefor, does not affect its validity, for it is a well-known fact, as stated by the court of appeals in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 112 Fed. Rep. 4, 16, that 'some of the richest mineral lands in the United States, which have been owned, occupied, and developed by individuals and corporations for many years, have never been patented.'"

Or, as phrased in *Wilbur* v. *Krushnic*, 280 U.S. 306, 317, quoted with approval in *Boesche* v. *Udall*, No. 332, last Term, *supra* (p. 6, note 7, of slip opinion):

> "The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent."

2. When the Colorado Land Office issued its receipt for the $7200 paid by Gabbs in respect of the Sibbald-Coral claims (Stewart affi. ¶5, and Ex. C thereto, JA 45, 47), it thereby adjudicated that Gabbs acquired an equitable title to those claims, and was entitled to a patent. See *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250, 256-257:

> "In the present case the Brick Company's application for a patent was filed, each of the several forms of notice required by statute was given, no adverse claim was filed, the purchase price was paid to the government, and a final receipt was issued by the local land office. The entry by the local land officer issuing the final receipt was in the nature of a judgment *in rem*

(*Wight* v. *Dubois*, 21 Fed. 693), and determined that the Brick Company's original locations were valid, and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse claims existed and that the Brick Company was entitled to a patent."

3. The circumstances (*supra*, pp. 5, 7) that oil and gas leases have been executed on lands on which both sets of claims were located of course does not militate against Gabbs' rights in the slightest. As the court below pointed out only recently (*Union Oil Co.* v. *Udall*, 289 F. 2d 790, 791, note 1), if the underlying mining claim is valid, no mineral lease can validly issue on the same land. Moreover, the Secretary of the Interior had earlier ruled that, when a mining location comes to light, such a location is so far property that it becomes his duty to cancel subsequent oil and gas leases (*Jensen et al., Keith et al.*, 63 I.D. 71, 74; *J.C. Nelson et al.*, 64 I.D. 103, 105), and that, in such a situation, he has no authority to refund the rentals already paid on the oil and gas leases thus cancelled (*L.N. Hagood et al.*, 65 I.D. 405). The Secretary's power of cancellation in those circumstances, see *Boesche* v. *Udall*, No. 332, last Term, *supra*, must now be deemed settled beyond dispute.

To summarize, then, a valid mining claim is property in every sense of that term, it need not be patented as a condition of subsequent validity, the passage of an equitable title and entitlement to a patent are adjudicated once the purchase price is paid and a receipt issued, and land covered by valid mining claims cannot be validly leased by the Secretary to third parties.

*Second.* As has been stated, the Secretary in 1929 and 1939 contested both groups of mining claims here involved on two grounds, (1) failure to perform annual assessment work, and (2) abandonment. Under this Court's decisions in *Wilbur* v. *Krushnic*, 280 U.S. 306, and *Ickes* v. *Development Corp.*, 295 U.S. 639, construing R.S. §2324; 30 U.S.C. §28, *infra*, pp. A9-A10, the first ground was admittedly in-

sufficient, and the rulings below did not rely upon it at any level. The validity of the second ground poses the single question now presented.

Petitioner's predecessors in title did not respond to the contest notices, and their entries were cancelled by default. It is for that reason that we formulate the question alternatively as "whether a valid, perfected mining claim, which constitutes property in the fullest sense of that term, can be wiped out and destroyed simply by a failure to reply to a letter written by the Secretary of the Interior."

Resolution of that question depends on whether what this Court said in the *Development Corp.* case was decision or dictum, and, if the latter, whether it has support in the authorities. (295 U.S. at 645):

> "There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. *Cameron* v. *United States*, 252 U.S. 450, 460; *Cole* v. *Ralph*, 252 U.S. 286, 296; *Black* v. *Elkhorn Min. Co.*, 163 U.S. 445, 450; *Brown* v. *Gurney*, 201 U.S. 184, 192; *Farrell* v. *Lockhart*, 210 U.S. 142, 147."

In respect of abandonment, the foregoing assertion was plainly dictum, because, as both the opinion and record plainly show, there was no abandonment issue in that case. See 295 U.S. at 646:

> "There is no ground for a charge of abandonment. The allegations of the bill [¶¶ 4 and 6, R. 1-2, No. 23, Oct. T. 1934], admitted by the motion to dismiss, dispose of any such contention."

That being so, anything said in the opinion concerning abandonment was, on basic first principles, necessarily *obiter*. We must therefore confess ourselves quite unable to understand, much less accept, the statement in the opinion below (*infra*, p. A4) that "the quoted language was in fact material to the decision."

*Third.* Moreover, the quoted dictum that the Secretary could cancel for subsequent abandonment mining claims that were originally valid was quite without support in the authorities cited, and—except for the ruling now sought to be reviewed—without support anywhere else.

By way of preliminary, however, a vital distinction must be kept in mind.

One. The Secretary has undoubted power in a proceeding seeking the issuance of a patent to determine the validity of a mining claim, to adjudicate whether the claimant has a valid right as against the United States, i.e., whether he has obtained property from the United States. Cf. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334. Thus, the Secretary can determine whether the claim is mineral, whether there has been discovery, whether the claim is so tainted by fraud as to preclude any right from arising. But here we are dealing with his power to defeat valid, perfected and existing claims by reason of later matters, his power to declare property destroyed and to revoke the grant (*Wilbur* v. *Krushnic; Boesche* v. *Udall*, quoted *supra* p. 10) by reason of events subsequent to the original location and perfecting of the claim.

Two. While the Secretary has power to determine whether a claimant has a valid mining right as against the United States, for many years, and during all of the periods here in question, he never had power to adjudicate administratively between adverse mining claimants. Such contests were, by the express terms of the statute (R.S. §2326; 30 U.S.C. §30; *infra*, pp. A11-A12), remitted to the civil courts. This limitation was not mentioned in *Best* v. *Humboldt Mining Co.*, 371 U.S. 334; indeed, the cited statute seems not to have been discussed in the briefs. But virtually all of the judicial decisions turning on abandonment arose in just such judicial contests, outside the administrative proceedings.

Accordingly, with the foregoing fundamental distinction in view, we turn to the five cases cited by this Court in its *Development Corp.* dictum, 295 U.S. at 645:

(a) The first case cited, *Cameron* v. *United States*, 252 U.S. 450, was an action in ejectment brought in a United States District Court following an administrative determination by the Secretary that Cameron's claim was invalid *ab initio* for lack of discovery. The *Cameron* case did not involve abandonment, much less did it involve any question of the Secretary's power to proceed administratively on the ground of subsequent abandonment against a mining claim valid when located.

We do not question the proposition, laid down in the *Cameron* case and specifically reaffirmed in *Boesche* v. *Udall*, No. 332, last Term, *supra*, pp. 4-6 of slip opinion, that if the power exists it is vested "in the land department," i.e., in the Secretary of the Interior. We do assert that, whatever the Secretary's power in respect of an invalid mining claim, such as was involved in *Cameron*, or in respect of a mineral lease, which as this Court only the other day said "does not give the fessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals" (*Boesche* v. *Udall*, *supra*, p. 6 of slip opinion, quoting the passages from *Wilbur* v. *Krushnic* already set forth herein at pp. 10 and 11, *supra*), the Secretary has no power to wipe out administratively the property in valid, perfected mining locations such as were involved here. Neither does any other administrative or executive officer have such power.

(b) All of the other four cases cited by this Court in its *Development Corp.* decision were judicial contests between adverse claimants brought in the civil courts pursuant to R.S. § 2326; 30 U.S.C. § 30; *infra* pp. A11-A12. Not a single one of those four involved an administrative proceeding brought by the Secretary.

It follows that not a single one of the cases cited in support of the *Development Corp.* dictum lends the slightest support to the proposition that the Secretary of the Interior may, on the ground of a subsequent abandonment, administratively cancel hitherto valid, perfected mining claims and adjudicate the loss of the property therein.

*Fourth.* Not only is there no judicial decision, other than the one now sought to be reviewed, which supports the *Development Corp.* dictum, but executive and legislative expressions join in demonstrating the unsoundness of that expression.

1. A reasoned Solicitor's Opinion, duly published in *Interior Decisions*, written by Judge Edward C. Finney, a master of land law,[2] stresses the difference between the Secretary's power to determine the validity of mining claims originally and his lack of power to cancel or even to adjudicate conclusively the subsequent abandonment of a mining claim originally valid, and hence to declare destroyed the property therein. See *Challenge to Validity of Mining Claims in National Parks*, 53 I.D. 491, 494, 495:

> "With regard to the propriety of bringing proceedings against mining locations in the national parks on a charge of abandonment, certain settled principles of law should be premised. They are: (1) That abandonment is a question of intent and, necessarily, if not evidenced by some unequivocal positive acts, is more difficult to prove than mere omission to perform legal requirements of work and improvement, which leave tangible evidence of their performance, and (2) That lapse of time, absence from the ground, or failure to work the claim for any definite period, unaccom-

[2] His service in the Office of the Assistant Attorney General for the Interior Department, later Office of the Solicitor, commenced in 1908 or 1909, see flyleaf in 37 L.D. From 1915 or 1916 until 1921, he was a member of the Board of Appeals in that office (44-47 L.D.). Thereafter he was First Assistant Secretary of the Interior from 1921 to 1929, and Solicitor of the Department from 1929 to 1933. See his paper on *The Board of Appeals, Department of the Interior*, 10 Am. Pol. Sci. Rev. 290 (1916).

panied by other circumstances, are not evidence of abandonment. Lindley on Mines, Sec. 644 and cases cited. The last-stated rule would have all the more force as to locations within the parks, where, under the present state of the law—unfortunately detrimental to the National Park Service—the mining claimant's possessory rights are not placed in jeopardy of statutory forfeiture by his delinquencies in failing to work his claim, and from such delinquency indifference could not be inferred as to what became of his rights.

* * * * *

"The * * * statement to the effect that if a claim in fact is abandoned, a departmental declaration to that effect hardly adds weight to the actual fact would seem to imply that it would not have the conclusiveness in legal effect that a departmental decision would have adjudging a claim void because the land was nonmineral or that a discovery thereon had not been made. For a decision on the grounds last mentioned 'is efficient and sufficient to extinguish absolutely, and forever, all force and effect said location presumably ever had, and to destroy such location and all evidence thereof for any purpose.' *Cameron* v. *Bass* (19 Ariz. 246; 168 Pac. 645, 648). And obviously, if the decision of the department holding a claim abandoned had like legal effect, it would be an advantage to the Government to adjudge a claim abandoned and thereby shut out any possibility of claim of validity thereafter.

* * * * *

"There is, also, another fact to consider; that is, that a question of abandonment does not present the question of validity or invalidity of a location *ab initio*, but implies that it was valid, for rights can not be abandoned that never existed. There is room, therefore, for considerable doubt as to the conclusiveness of a departmental finding that a mining location was abandoned."

The foregoing Solicitor's Opinion, it is proper to note, was simply brushed aside in the administrative rulings herein (JA 34-35), and the opinion now sought to be reviewed passes it by in silence, although it was heavily re-

lied on by petitioner in all of the three briefs it filed in the court below before argument there.

This Court's decisions over many years reflect what has twice been reasserted at the last Term (*Best* v. *Humboldt Mining Co.*, 371 U.S. 334; *Boesche* v. *Udall*, No. 332, *supra*), the view that administrative rulings by the land department are entitled to weighty respect by the courts. We urge here the other side of the coin, the proposition that such rulings are also entitled to respect within the land department and are not to be brushed aside by the Secretary's delegates whenever—and simply because—adherence thereto would result in granting to a claimant what it seeks.

2. The course of legislation, also, reflects an awareness of the Secretary's lack of power to cancel valid mining claims on a charge of subsequent abandonment. To begin with, a mining claim is recorded only in county records without knowledge of the Interior Department, it is indexed only by the name of the claimant and the name of the claim, and it could validly be located on unsurveyed lands and described only with reference to natural monuments. See Due, *Multiple Mineral Development Problems—Public Law 585 in Retrospect*, 31 Rocky Mountain L. Rev. 269, 271-273. Many such claims were abandoned in fact, but their existence interfered with development of the land. If, therefore, the Secretary of the Interior had power to dispose of such claims administratively, and thus to avoid conflicts with subsequent leases, compare the Departmental rulings cited at p. 12 above, it is hardly likely that he would have failed to do so. In fact, he did not act, and it required additional legislation in 1954 to give him the power to clear up inactive mining claims that the court below ruled he already had. Sec. 7 of the Act of Aug. 13, 1954, c. 739, 68 Stat. 708, 711, 30 U.S.C. § 527.

The Committee Reports on the cited legislation show that Congress was concerned over "the title uncertainties which follow from the possible existence of unidentifiable mining

locations and from the uncertain status of old and inactive locations" (Sen. Rep. 1610, 83rd Cong., 2d sess., p. 4; H.R. Rep. 2028, 83rd Cong., 2d sess., pp. 9-10). No doubt the 83rd Congress would have been vastly surprised to learn that the scheme for quieting title it was then enacting was quite unnecessary, that the Secretary even in the absence of this additional legislation already had ample power to cancel inactive and dormant mining locations administratively.

The net of the foregoing is that both the Solicitor's Opinion in 1931 as well as the Act of Congress in 1954 join in demonstrating the patent incorrectness as well as the unsettling effect of the ruling below.

*Fifth.* Lest our silence on the point be misconstrued, we deem it appropriate to point out, in answer to what was said below (*infra*, p. A8)—"Further, nowhere does plaintiff offer any facts showing that its predecessors in interest had *not* abandoned the claims in 1929"—that opportunity to make such a showing was specifically denied petitioner by the Secretary (JA 37-38).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JUNE 1963.

## APPENDIX A

### OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 16,803

GABBS EXPLORATION COMPANY, APPELLANT

v.

STEWART L. UDALL, Secretary of the Interior

---

Appeal from the United States District Court
for the District of Columbia

---

Decided February 14, 1963

*Mr. Frederick Bernays Wiener*, with whom *Mr. Fred H. Evans* was on the brief, for appellant.

*Mr. Thomas L. McKevitt*, Attorney, Department of Justice, with whom *Assistant Attorney General Clark*, and *Messrs. Roger P. Marquis* and *Harold S. Harrison*, Attorneys, Department of Justice, were on the brief, for appellee. *Mr. S. Billingsley Hill*, Attorney, Department of Justice, also entered an appearance for appellee.

Before WILBUR K. MILLER, BASTIAN and BURGER, Circuit Judges.

BASTIAN, *Circuit Judge:* This is an appeal from a judgment of the District Court dismissing plaintiff's [appellant's] complaint for declaratory judgment and for "relief in the nature of mandamus." The plaintiff sought a judgment declaring invalid two contest proceedings involving property hereinafter referred to; a judgment that the decisions of defendant's [appellee's] predecessor cancelling

certain mineral entries are null and void; a judgment enjoining defendant from rejecting plaintiff's applications for patents; and a judgment directing defendant to determine the right of plaintiff to patents for certain mining claims, without regard to the contests.

On July 24, 1918, plaintiff's predecessor in title located eight oil placer claims in Rio Blanco County, Colorado (Mullins claims). On March 30, 1929, the then Secretary of the Interior instituted against the record owners of these claims a contest, No. 11977, in which it was charged:

> "2. That there has not been expended upon each and every one of the claims labor and improvements of a reasonable value of $100 for the assessment years ending July 1, 1921, to July 1, 1928, inclusive, and the claims have been abandoned."

The record owners were served with the contest notice, but they filed no objection and, in fact, made no appearance. Thereafter, on June 5, 1929, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, declared the contested oil shale locations null and void, and notified the contestees accordingly. No further action appears to have been taken until April 14, 1956, when plaintiff purchased, by quitclaim deed, the mining claims in question. Thereafter, plaintiff made applications for patents on all of said claims, which were duly rejected.

The second cause of action set forth in the complaint is known as the Sibbald-Coral claims. In December 1917 and February 1918, plaintiff's predecessor in title located eighteen oil placer claims in Garfield County, Colorado. On December 31, 1929, defendant's predecessor in office caused a contest, No. 12111, to be instituted against the record owner of the said claims, in which it was charged:

> "1. That there has been no assessment work performed upon any of the above described placer mining

claims for the assessment years ending July 1, 1921, up to and including July 1, 1929.

"2. That each and every one of said claims has been abandoned."

On January 13, 1930, the record owner of the claims was served a copy of the contest notice but failed to file an answer within the time allowed by the regulations of the Department of the Interior governing contests. Accordingly, on May 19, 1930, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, declared the contested oil shale locations null and void, and the contestee was duly notified. On March 21, 1956, plaintiff purchased, by quitclaim deed, the mining claims in question and duly applied for a patent covering all said claims. The application was rejected, after which the present suit was instituted.

On cross-motions for summary judgment, the District Court entered judgment granting defendant's motion for summary judgment and denying that of plaintiff, and dismissed the complaint. This appeal followed. We affirm the judgment of the District Court.

Plaintiff's case is pitched largely on three grounds. It argues that the proceedings resulting in the cancellation of the claims were null and void, first, because the Supreme Court has held that a charge of failure to perform assessment work may not be a basis for declaring unpatented mining claims invalid;[1] second, because of the Secretary of the Interor lacks authority to declare unpatented mining claims invalid by reason of abandonment; and finally, because, even if the Secretary does have such authority, the charges of abandonment in this case are invalid since they were not supported by an allegation of the particular facts

[1] *Ickes* v. *Development Corp.*, 295 U.S. 639 (1935); *Wilbur* v. *Krushnic*, 280 U.S. 306 (1930).

constituting abandonment, as required under the rules of the Department of the Interior.

It is true that the Supreme Court did hold that failure to perform assessment work may not be the basis for holding unpatented mining claims invalid; however, this does not affect the charge that plaintiff's mining claims had been abandoned. The two charges are separate and distinct. And we find no merit in the contention that the Secretary lacked authority to cancel the mining claims by reason of abandonment. In fact, in *Ickes* v. *Development Corp.*, 295 U.S. 639 (1935), one of the cases relied upon by plaintiff and having to do with the charge of failure to perform assessment work, the Supreme Court said:

> "There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud or other defect, *or that it was subject to cancellation by reason of abandonment.*" 295 U.S. at 645. [Emphasis supplied.]

Plaintiff contends that this expression, quoted from Mr. Chief Justice Hughes's opinion, is *obiter dictum*. We are unable to say that that is the case, because it seems to us that the quoted language was in fact material to the decision. Assuming it was *dictum*, however, we recognize the fact that, although a decision of an appellate court is controlling only to the extent of the actual facts involved, and an expression as to the law based on other facts is regarded as *dictum* and not controlling on lower courts, such *dictum* certainly deserves serious consideration. That, indeed, is the general rule in federal courts.

> "If these conclusions were dicta, it does not necessarily follow that they were wrong, and certainly dicta of the United States Supreme Court should be very persuasive." *Fouts* v. *Maryland Casualty Co.*, 30 F.2d 357, at 359 (4th Cir. 1929), *reversing* 27 F.2d 423, *cert. denied*, 279 U.S. 852 (1929).

"The considered dicta of a court of last resort are entitled to the respectful recognition of interior courts within the same judicial system." *United States* v. *Roemig*, 52 F.Supp. 857, at 861 (N.D. Iowa 1943).

"It [the quotation] declares the view of the Court [United States Supreme Court] and has strong persuasive influence on the lower courts." *International Ry. Co.* v. *Davidson*, 65 F.Supp. 58, at 59 (W.D.N.Y. 1945).

The owners of the Mullins and the Sibbald-Coral claims were not denied due process in the original contests, for it is clear that they had adequate notice of the contest against them, they were offered a hearing, and they were informed of the cancellation of their claims. In view of what we have previously stated, there was no jurisdictional defect in the 1929 contests. The only defect that plaintiff can point to in those initial contests is the failure of the complaint to allege the facts of abandonment and the lack of supporting affidavits. Plaintiff urges that these defects render the original judgments void. We do not think so.

Plaintiff's predecessors in interest might have corrected these errors or defects, if errors or defects there were, by timely appeal to the Secretary of the Interior from the decision of the Commissioner of the General Land Office. As timely appeal was not taken then, it is now too late for plaintiff to seek to correct any errors or defects by collateral attack.

None of the cases cited by plaintiff[2] bear out its position that the alleged defects in the 1929 proceedings rendered those proceedings void. All of those cases were timely appeals from decisions of the Commissioner of the General Land Office. Two of the cases do not even involve the

[2] *Fosdick* v. *Shackleford*, 47 L.D. 558; *Raber* v. *Smith, Leight, Intervener*, 51 L.D. 46; *Roark* v. *Tarkington, McCracken, Intervener*, 51 L.D. 183; *The Shale Oil Company*, 55 I.D. 287; *J. C. Nelson, et al.*, 64 I.D. 103.

question of abandonment;[3] and the remaining cases involve the question whether a good and sufficient affidavit of contest had been filed, or whether a demurrer to a complaint of abandonment which alleged no facts and contained no affidavit should have been sustained. The latter cases show that a demurrer to the original complaints herein might have been sustained, but do not show that the judgments were void. Plaintiff's predecessors not only did not interpose a demurrer, but failed to appeal from the decision against them. Any defect could have been and should have been cured upon appeal. Because of the policy of the Department of the Interior to allow amendments to the complaint freely, there is all the more reason why plaintiff's predecessors should have sought immediate review of the original determination.[4] As it was not done then, it should not be done now by collateral attack where no jurisdictional defect appears which justifies overturning a settled decision.[5]

Plaintiff points out that so long as the Department of the Interior retains jurisdiction over the land in question, prior departmental decisions are not strictly *res judicata*. Of course, this is correct, for there have been cases in which the Secretary of the Interior has reopened prior decisions in order to correct error. E.g., *West* v. *Standard Oil Co.*, 278 U.S. 200 (1929). Plaintiff argues that, since the Secretary has retained jurisdiction over the disputed land in this case, it follows ineluctably that he must reopen the 1929 decisions and correct any errors there appearing. The premise does not beget the conclusion.

We need not consider whether the power to reopen prior decision is merely discretionary with the Secretary[6] or

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[3] *The Shale Oil Company; J. C. Nelson, et al.;* both *supra* note 2.

[4] *Fosdick* v. *Shackleford*, *supra* note 2.

[5] Cf. 3 FREEMAN, JUDGMENTS, § 1297 (5th ed. 1925).

[6] *Johnnie E. Whitted, Bill Smith*, 61 I.D. 172.

whether, indeed, the errors urged by plaintiff demonstrate that "manifest injustice has been done or the law clearly misapplied."[7] as is required for reopening. Even if we assume that Gabbs has met these threshold objections, plaintiff's argument cannot prevail. The Department of the Interior, which has recognized the right of the Secretary to reconsider certain prior decisions,[8] has also recognized that there must be some time limit on such reconsideration. As Assistant Attorney General Van Devanter said in *Aspen Consolidated Mining Co.* v. *Williams*, 27 L. D. 1, at 11:

> "The parties remain the same and the one complaining of the former decision has taken timely and decisive action to have the alleged wrong corrected."

Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years. Here twenty-seven years have elapsed between the alleged wrong (1929) and plaintiff's attempt to have it corrected (1956). There might be some reason to impel the Secretary to reopen a prior decision in order to purge an incorrect determination, but the passage of time might prevent or greatly hinder a proper determination of the initial question, in which case it would be inappropriate for him to reopen

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[7] *Parcher* v. *Gillen*, 26 L.D. 34, at 43.

[8] *Gage* v. *Atwater*, 21 L.D. 211; *Osborn* v. *Knight*, 23 L.D. 216; *Parcher* v. *Gillen*, *supra* note 7; *Cagle* v. *Mendenhall*, 26 L.D. 177; *Seixas* v. *Glazier*, 26 L.D. 49; *Aspen Consolidated Mining Co.* v. *Williams*, 27 L.D. 1; *Ernest B. Gates* (on rehearing), 41 L.D. 384; *Howard A. Robinson*, 43 L.D. 221; *The Shale Oil Company*, *supra* note 3; *Earl C. Presley*, *David Esplin*, et al., Interveners, is distinguishable since the case did not involve reconsideration of a prior adjudication, but rather the impropriety of the original granting of a license.

the case even though he retains jurisdiction over the land in dispute. This is such a case, for it is now difficult, if not impossible, for the Secretary to determine the facts as to the original abandonment in 1929. Further, nowhere does plaintiff offer any facts showing that its predecessors in interest had *not* abandoned the claims in 1929. This is certainly not a case in which the court should order reopening of the initial contest. Nothing in *West* v. *Standard Oil Company, supra*, casts the slightest doubt on this conclusion.

It follows that the judgment of the District Court must be and is

*Affirmed*

---

## APPENDIX B

### JUDGMENTS BELOW

### (1) Judgment of Affirmance

[Caption Omitted]

APPEAL FROM the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Bastian and Burger, Circuit Judges.

### JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Bastian.

Dated: FEB 14 1963

**(2) Order Denying Rehearing**

[Caption Omitted]

Before: Bazelon, Chief Judge, and Edgerton, Miller, Fahy, Washington, Danaher, Bastian, Burger and Wright, Circuit Judges in Chambers.

ORDER

On consideration of appellant's petition for rehearing en banc, it is

ORDERED by the court en banc that the petition is hereby denied.

Per Curiam.

Dated: MAR 26 1963

---

## APPENDIX C

### STATUTES INVOLVED

1. R.S. § 2324, as amended, now 30 U.S.C. § 28, provides in pertinent part as follows:

**"§ 28. Mining district regulations by miners; annual labor on claims pending issue of patent; expenditure on tunnels considered**

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monu-

ment as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coowner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coowners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of locationof such claim. * * *"

2. R.S. 2326, now 30 U.S.C. § 30, provides as follows:

**"§ 30. Adverse claim; proceedings and subsequent filing of judgment roll by successful claimant**

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the United States supervisor of surveys that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the register $5 per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate

and description by the United States supervisor of surveys, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 226

GABBS EXPLORATION COMPANY, PETITIONER

*v.*

STEWART L. UDALL, SECRETARY OF THE INTERIOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF IN OPPOSITION FOR THE RESPONDENT

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A8) is reported in 315 F. 2d 37. The district court did not write an opinion.

### JURISDICTION

The judgment of the court of appeals was entered on February 14, 1963. A petition for rehearing was denied on March 26, 1963. The petition for a writ of certiorari was filed on June 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the Secretary of the Interior has authority to declare mining claims null and void on the ground of abandonment.

## STATUTES INVOLVED

Section 441, Revised Statutes, as amended, 5 U.S.C. 485, provides in pertinent part:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:
>
> * * * * *
>
> 13. Public lands, including mines.

Section 453, Revised Statutes, 43 U.S.C. 2, provides:

> The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

## STATEMENT

On July 24, 1918, eight oil shale placer mining claims, known as the Mullins claims, were located on lands of the United States in Rio Blanco County, Colorado. In December 1917, and February 1918, 18 similar mining locations, known as the Sibbald-Coral claims, were made on public lands in Garfield County, Colorado. Since adoption of the Mineral Leasing Act of 1920, 41 Stat. 437, oil shale lands have no longer been open to location but pursuant to Section 37 of that Act, 41 Stat. 451, 30 U.S.C. 193, "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated * * * may be perfected under such laws, including discovery."

On March 30, 1929, respondent's predecessor in office, acting in accordance with a procedure established by his regulations, caused a contest to be initiated against locators of the Mullins claims based on charges that yearly assessment work of a reasonable value of $100.00 had not been performed and that the claims had been abandoned. Notice was served on the claimants in a form which stressed that pursuant to departmental rules of practice failure to answer would be taken as an admission of the truth of the charges (Jt. App. 10–11). No answer nor other form of response was made. On June 5, 1929, the Commissioner of the General Land Office, acting for the Secretary, declared the Mullins claims null and void. Notice of this action was also given to the locators who, again, made no response (Jt. App. 11–12).

On December 31, 1929, the then Secretary of the Interior also caused a contest to be instituted against the locators of the Sibbald-Coral claims based on the same charges, i.e., failure to do assessment work and abandonment. Service was made on the locators but no answer or response was made. By Commissioner's letter dated May 19, 1930, these claims were declared null and void. The Sibbald-Coral locators were informed of this action but made no response (Jt. App. 20–22).

Some of the lands included in the Mullins claims were patented in February 1921, and February 1923, and 640 acres of the area covered by the Sibbald-Coral claims were patented in 1940. These patents reserved the mineral rights. A 1930 executive order withdrawing all oil shale lands from the public do-

main was later modified to permit oil and gas leasing and, since 1954, oil and gas leases have been issued by the United States on substantial portions of the land (Jt. App. 13, 19, 33, 43).

In 1956, petitioner obtained quit-claim deeds from the original locators or their assignees and applied for patents pursuant to the provisions of 30 U.S.C. 21 (Jt. App. 11, 20–21, 40–42). The Manager of the Land Office at Denver, on February 14, 1958 (Sibi ld-Coral), and August 25, 1958 (Mullins), rejected the applications on the obvious ground that the claims had been declared null and void. In separate appeals, the Director of the Bureau of Land Management affirmed by decisions dated April 20, 1959, and June 29, 1959, and the Secretary of the Interior affirmed by decisions dated April 25, 1960 (Jt. App. 17–38), and May 24, 1960 (Jt. App. 15–17). This suit was then instituted resulting in the entry of summary judgment in favor of the respondent on December 1, 1961 (Jt. App. 55). The Court of Appeals for the District of Columbia Circuit affirmed on February 14, 1963 (Pet. App. A1–A8).

## ARGUMENT

The decision below is correct and not in conflict with decisions of this Court or any other court. Accordingly, there is no need for further review.

1. Faced with the authority of *Cameron* v. *United States*, 252 U.S. 450, and *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, petitioner concedes that the Secretary of the Interior has the "undoubted power" to determine the validity of mining claims with respect to such matters as sufficiency of discovery, the mineral-

ity of the land and all similar issues going to deciding whether the locator "has obtained property from the United States" (Pet. 14). Nor is it denied that a mining claim can be lost by abandonment—as this Court has often held. *Black* v. *Elkhorn Mining Co.*, 163 U.S. 445, 450; *Farrell* v. *Lockhart*, 210 U.S. 142, 147. Petitioner's sole point is that the Secretary is without authority to determine charges against mining claims based on events "subsequent to the original location and perfecting of the claim" (Pet. 14). No case so limiting the authority of the Secretary is cited, and a precise statement in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, 645, affirming the Secretary's authority to cancel mining claims by reason of abandonment, is, without more, dismissed as dictum.[1]

2. The authority of the Secretary of the Interior to determine all issues relating to asserted rights against the United States in the public domain "so long as the legal title * * * remained in the United States" has consistently been pronounced by this Court. *United States* v. *Schurz*, 102 U.S. 378, 396 (1880); *Orchard* v. *Alexander*, 157 U.S. 372, 383 (1895);

[1] A preliminary defect in petitioner's argument is the assumption that a charge of abandonment necessarily assumes a "perfected" claim. This is not correct. Just as a court that disposes of a case on the basis of a statute of limitations or on proof that a mining claim has been abandoned is not required to make a finding with respect to the initial validity of the barred interest no more does the Secretary rule on the validity of mining claims if he finds they have been abandoned. He does not have to reach that issue. The point is that, valid or invalid, the claim no longer exists and possession reverts to the United States.

*Knight* v. *U.S. Land Association*, 142 U.S. 161, 177 (1891); *Cameron* v. *United States*, 252 U.S. 450, 459–460 (1920); *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 338 (1963); *Boesche* v. *Udall*, No. 332, October Term, 1962. This long-recognized authority is not limited to determining whether an "equitable interest" has been earned in the first instance by a homestead applicant or a mining claimant but includes authority to consider and determine whether subsequent conduct of the applicant or claimant has resulted in loss of such an interest. As this Court said in *Best* v. *Humboldt Mining Co.*, *supra* (p. 338), "If a patent has not issued, controversies over the claims 'should be solved by appeal to the land department and not to the courts.' *Brown* v. *Hitchcock*, 173 U.S. 473, 477." Petitioner urged below that the Department of the Interior retains jurisdiction over the land in question (Pet. App. A6). He does not deny that such issues as "if the lands are still mineral" (*Best* at p. 336) and "so long as he complies with the provisions of the mining laws" (*Boesche*, fn. 7), which the Secretary may decide, relate to events "subsequent to the original location and perfecting of the claim" (Pet. 14). Hearings on such issues, subsequent to original location on the public domain, are treated as appropriate for executive administration in the first instance.

Thus, in *Orchard* v. *Alexander*, 157 U.S. 372, cited with approval in *Cameron* v. *United States*, 252 U.S. 450, 460–461, the Secretary's authority was upheld with respect to a preemption claim that had been accepted and payment completed—a situation that also involved

an interest that was property "in the fullest sense of the term." In that case, this Court held that the Secretary could decide whether there had been fraud in the making of final proofs, saying (p. 383):

> The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department.

See also *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589, 593. And even in *Wilbur* v. *Krushnic*, 280 U.S. 306, where it was held that the Secretary had erred in declaring a claim forfeited for failure to do assessment work, this Court did not question the Secretary's *jurisdiction* to make such a determination. Finally, as noted by the court of appeals (Pet. App. A4), the scope of the Secretary's authority on this precise point was unequivocally declared by Mr. Justice Hughes in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, 645, as follows:

> There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, *or that it was subject to cancellation by reason of abandonment.* [Emphasis added.]

Petitioner seeks to dismiss the foregoing as dictum but fails to show that it is not in complete harmony with the reasoning of the foregoing authorities. It has long been followed by the courts. See, e.g., *Rob-*

*bins* v. *Elk Basin Consol. Petroleum Co.*, 285 Fed. 179, 181 (D. Wyo., 1922), holding conclusive in subsequent litigation a departmental declaration that a mining claim had been abandoned.

3. The "executive and legislative expressions" relied upon as proof of the unsoundness of the "*Development Corp.* dictum" (Pet. 16–18) do not support petitioner's argument. The 1931 opinion of Solicitor Finney, 53 I.D. 491, concluded only that there was "room * * * for considerable doubt" as to the conclusiveness of a departmental finding of abandonment. An expression of doubt is not authority for the negative. The Act of August 13, 1954, 68 Stat. 708, 711, 30 U.S.C. 527, merely provides a method whereby lessees or holders of a related interest under the mineral leasing laws can institute a procedure for the purpose of having conflicting mining claims limited to minerals not governed by the leasing laws. The latter legislation, at best, merely supplements the Secretary's independent authority to institute adverse proceedings and to find that mining claims have been lost by failure to comply with the mining laws or by abandonment.[2] Indeed, abandonment would seem to

[2] As the modification of the decree directed by this Court in *Wilbur* v. *Krushnic*, 280 U.S. 306, 319, demonstrates, it is not correct to state (Pet. 11–12) that "the passage of an equitable title and entitlement to a patent are adjudicated once the purchase price is paid and a receipt issued." See also *Cameron* v. *United States*, 252 U.S. 450, 460–461; *Union Oil Co.* v. *Udall*, 289 F. 2d 790 (C.A.D.C. 1961); *Adams* v. *United States*, No. 17,902 (C.A. 9, June 10, 1963). The fact that the Colorado Land Office issued petitioner a routine receipt for the $7,200 it paid in connection with its patent application (Pet. 11) did not overturn the prior adjudication of abandonment, later

be by definition failure to comply with the mining laws.

4. Lastly, there are no "inconsistencies" or "conflicting expressions" in this Court's recent *Boesche* and *Best* cases (Pet. 9). In both decisions, this Court upheld the broad authority of the Secretary over public land matters, particularly in matters appropriate for continuing administrative supervision. The issue of the abandonment of mining locations, throughout the public domain, is important to the administration of those lands and an appropriate subject of executive supervision. Since *Best* v. *Humboldt Mining Co.* did not involve "adverse mining claims" or an application for a patent, we do not understand petitioner's reference to the provisions of 30 U.S.C. 30 in its criticism of that decision (Pet. 9, 14).

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

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brought to light in processing the application. *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250, 257 (Pet. 11-12) merely holds that rights of a claimant may not be declared void upon review by the Secretary for a wrong legal reason.

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# Supreme Court of the United States

OCTOBER TERM, 1963

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## No. 226

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GABBS EXPLORATION COMPANY, *Petitioner,*

v.

STEWART L. UDALL, Secretary of the Interior.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## PETITIONER'S REPLY MEMORANDUM

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## PETITIONER'S REPLY MEMORANDUM

Respondent does not dispute our assertion (Pet. 10) that the question now tendered "is presently involved in a host of proceedings currently pending at various stages within the Interior Department's lengthy administrative processes."

But since his opposition beclouds unduly an area of law that no degree of optimism—or of accuracy—can fairly characterize as clear, we deem it appropriate to add a few words to assist the Court in orienting itself among the diversities.

1. The basic conflict among the decisions here is between the proposition, repeated at the last Term (*Best* v.

*Humboldt Mining Co.*, 371 U. S. 334, 338), that, "If a patent has not yet issued, controversies over the claims 'should be solved by appeal to the land department and not to the courts,'" and the holding in *Boesche* v. *Udall*, 373 U.S. 472, 478, also at the last Term, that the Secretary has administrative power to cancel a mineral lease, because that instrument "does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals" —citing and quoting from *Wilbur* v. *Krushnic*, 280 U. S. 306, 316-317.

Petitioner's predecessors in title, owners of mining claims, had unencumbered estates in the minerals; as this Court said in the *Krushnic* case, *loc. cit. supra*, "his possessory right, for all practical purposes of ownership, is as good as though secured by patent."

Therefore the question here is which of these two divergent lines of doctrine controls here. Was petitioner's right "as good as though secured by patent," as it contends, or was it not really as good as secured by patent, and hence still subject to destruction by the Secretary as the latter urges?

Nothing in the Secretary's Brief in Opposition assists in resolving that question.

2. As we have always conceded (Pet. 13), a dictum in *Ickes* v. *Development Corp.*, 295 U. S. 639, 645, is against us, and the court below genuflected thereto without the slightest effort at analysis (Pet. App. A4-A5).

We went on to explain why none of the authorities cited in the *Development Corp.* decision supported the dictum (Pet. 14-16), and the Secretary does not even attempt to rehabilitate these authorities. (We pass the obvious point that our detailed analysis of the authorities is hardly subject to the Secretary's remark (Br. Op. 5) that in our Petition the expression in the *Development Corp.* case "is, without more, dismissed as dictum.")

We note further that, unlike the court below (Pet. App. A4), the Secretary does not assert that what was said in the *Development Corp.* case regarding his power to cancel valid, perfected mining claims for subsequent abandonment was necessary to the decision, nor could he, since abandonment was excluded both by the record and the opinion in that case (Bill of Complaint, ¶¶ 4, 6, R. 1-2, No. 23, Oct. T. 1934; 295 U. S. at 646, quoted at Pet. 13).

Moreover, the subject matter of the dictum in the *Development Corp.* case was conceded rather than contested by the respondent there (Resp. Br. 8, No. 23, Oct. T. 1934), so that, on familiar principles, even the dictum has less weight than it would have had if the proposition it asserted had been the subject of a genuine challenge. E. g., *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37-38, and cases there cited; *Gaines* v. *Relf*, 12 How. 472, 537-539.

Finally, the Secretary contends (Br. Op. 7) that the *Development Corp.* dictum "has long been followed by the courts," citing (Br. Op. 7-8) "e.g., *Robbins* v. *Elk Basin Consol. Petroleum Co.*, 285 Fed. 179, 181 (D. Wyo., 1922)."

This is loose citation with a vengeance. Since the *Development Corp.* case was decided here in 1935, obviously it was not followed by a District Court over a decade earlier, in 1922. Moreover, the *Robbins* case did not involve, as does the case at bar, an effort to cancel a perfected mining claim for subsequent abandonment. It dealt with a preference right to a lease in which it had been determined that the prospective claimant was not entitled thereto because the mining claim on which the preference depended had been abandoned.

The fact of the matter is that the Secretary's "e.g." (Br. Op. 7) is thoroughly misleading, because it entirely conceals the complete absence of holdings his way on the present issue. He cites no such holdings—and, apart from the ruling sought to be reviewed, we know of none.

8. We are, of course, aware that a Reply Memorandum such as this one should not concern itself with debating points, but we consider it a duty to expose certain of the obfuscations devised by the Secretary in his effort to defeat review in this case.

(a) He says (Br. Op. 7): "And even in *Wilbur* v. *Krushnic*, 280 U. S. 306, where it was held that the Secretary had erred in declaring a claim forfeited for failure to do assessment work, this Court did not question the Secretary's *jurisdiction* to make such a determination." [Italics in original.]

What that case held however was, not that the Secretary had erred, but that he had no *power* to declare a claim forfeited on that ground. We had supposed, along with Mr. Justice Curtis (30 Fed. Cas. at 1342-1343), that power and jurisdiction were synonymous.

(b) In response to our contention (Pet. 18-19) that the enactment of Sec. 7 of the Act of Aug. 13, 1954, c. 739, 68 Stat. 708, 711, 30 U. S. C. § 527, which empowered the Secretary to dispose of dormant mining claims, demonstrated his lack of such power earlier, the Secretary says (Br. Op. 8) that this legislation, "at best, merely supplements the Secretary's independent authority to institute adverse proceedings and to find that mining claims have been lost by failure to comply with the mining laws or by abandonment."

No doubt the foregoing is a convenient rationalization at the present juncture. But the Secretary's suggestion that he was being granted supplementary powers in 1954 is not supported by so much as a syllable in either of the committee reports on the 1954 legislation. Sen. Rep. 1610 and H. R. Rep. 2028, both 83rd Cong., 2d sess., both *passim*.

(c) Finally, mention must be made of the Secretary's footnote suggestion (Br. Op. 5, n. 1) that petitioner's predecessors in title did not have valid, perfected mining claims.

The voluminous proceedings within the Interior Department (JA 9-39) do not even suggest that the several claims now in issue were not in every sense fully perfected at the time of location. Neither does the Secretary's answer in the present litigation (JA 40-43). The original contests (JA 11, 20) never questioned the original validity of any of the claims. And, of course, the Secretary, who asserted that portions of the land on which petitioner's claims were located had been the subject of oil and gas leases to third parties (JA 43), leases that he plainly could not lawfully make if petitioner's claims were valid (*Union Oil Co.* v. *Udall*, 289 F. 2d 790, 791, note 1 (D. C. Cir.)), will hardly now endeavor to contend that the present claims concern lands that are non-mineral.

## CONCLUSION

The question presented is one of continuing public interest that is neither foreclosed nor indeed resolved by prior decisions. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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